# INDEX

## TABLE OF CONTENTS

INDEX—(Continued)



## STATUTES



## LIST OF CASES

INDEX—(Continued)

INDEX—(Continued)



Note: The Submission Pamphlet containing the ICC's Reports incorporating the Plan is part of the printed record in 638, Supreme Court of the United States, October Term 1946, and appears as Exhibit 2, page 65.

The Report of the ICC of December 4, 1946, modifying the Plan.

In The

# Supreme Court of the United States

October Term, 1945

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No.

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ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Debtor, Petitioner,

vs.

CENTRAL HANOVER BANK AND TRUST COMPANY and DANIEL K. CATLIN, Trustees under the Prior Lien Mortgage of St. Louis-San Francisco Railway Company; THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK and JOHN A. AID, Trustees under the Consolidated Mortgage of St. Louis-San Francisco Railway Company; BANKERS TRUST COMPANY and WALTER W. SMITH, Trustees under the Refunding Mortgage of The Kansas City, Fort Scott and Memphis Railway Company; OLD COLONY TRUST COMPANY, Trustee under the General Mortgage of Kansas City, Memphis and Birmingham Railroad Company; JOHN W. STEDMAN, WALTER H. BENNETT, FRED P. HAYWARD and IRVIN L. PORTER as St. Louis-San Francisco Railway Company Prior Lien Bondholders' Committee; FREDERIC H. ECKER, BERTRAM CUTLER, WILLIAM L. DeBOST and PIERPONT V. DAVIS, as Consolidated Mortgage Bondholders' Committee; JAMES H. BREWSTER, JR., SAMUEL S. HALL, JR., and J. F. B. MITCHELL, as The Kansas City, Fort Scott and Memphis Railway Company Refunding Mortgage Bondholders' Committee; and JOHN W. STEDMAN, JAMES H. BREWSTER, JR., FREDERIC W. ECKER and RICHARD J. LOCKWOOD, as REORGANIZATION MANAGERS,

Respondents.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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St. Louis-San Francisco Railway Company, Debtor, prays that writs of certiorari issue to review the decrees of the United States Circuit Court of Appeals of the Eighth Circuit entered on the 16th day of April, 1947, one dismissing the appeal of the petitioner from an order of the District Court of the United States for the Eastern District of

(R. 279)



Missouri consummating a Plan of Reorganization of the Debtor's property under §77 of the Bankruptcy Act (No. 13521 in C.C.A.), and one docketing and dismissing the appeal of the petitioner from an order discharging the Trustee in the proceedings for reorganization in said cause (No. 13545 in C.C.A.). (R. 280)

The questions which the Circuit Court of Appeals refused to review are of general concern in railroad reorganizations under Section 77. We ask that the Circuit Court of Appeals be required to review them, or, in the alternative, that the Supreme Court take and review the record material thereto.

A separate petition for a writ of certiorari is concurrently filed herewith asking review of the Order dismissing the appeal from the Order of the District Court discharging the Trustee (No. 13545 in the C.A.A.).

The questions which the Circuit Court of Appeals refused to review are:

1. Whether the bankruptcy court had jurisdiction to seize the Debtor's corporate right to exist and to that end direct procedures to cancel all the stock of Debtor's stockholders and vest all of Debtor's corporate powers in others.

2. Whether the amounts due the various creditors on the principal of their claims at the time of final decree should be determined by the court after judicially applying the rules of bankruptcy administration to allocate cash received from the operation of the property by the court; whether the amount of interest to be allowed during the period of administration and remaining unpaid at the time of final decree should be determined by the court after giving judicial consideration to the causes of delay, uniformity of interest rates, the amount of money collected by it for the benefit of the creditors and either paid to the creditors or withheld by the court, and the rate of interest at which the money so withheld might have been secured in the market, and whether the court having so determined the amount of the unsatisfied obligations at the time of

final decree should have assumed that the creditors were in the future entitled to receive interest on the unpaid interest accumulated during administration at the same rate as they are adjudged entitled to interest on unpaid principal.

3. Whether it was a breach of trust for the Trustee to neglect the opportunity to compromise claims of creditors at a large discount so as to leave ample assets for the payment of remaining claims and augment the Debtor's equity.

4. Whether at the time of final decree the trial court was required to give force and effect to chapter 324, Public Law 404, Laws of the Seventy-ninth Congress, Second Session 1946, §10, subdivision (e) [5 USCA, chapter 19, §1009, subdivision (e)], and in the light of that Act, passed subsequent to the order confirming the Plan, review the administrative action of the Interstate Commerce Commission maturing in the certified Plan of Reorganization, for the purpose of determining whether there was *substantial evidence* in the record before the Interstate Commerce Commission upon which to base a finding of future earnings so low as to support a finding that Debtor's interest was of no value and that the claims of unsecured creditors are without value.

5. Whether due process entitled the Debtor to be heard by the Commission when the Commission was asked to give approval to the seizure of Debtor's corporate charter.

6. Whether due process entitled the Debtor to be heard on a motion for rehearing directed to the Order of Consummation.

The answers to the above questions have been ruled against the Debtor under what the Debtor believes to be a misconception by the lower courts of the law declared by this Court in *Ecker, et al., v. Western Pacific RR Corpn, et al.,* (318 U. S. 448), *Group of Institutional Investors, et al., v. Chicago, Milwaukee, St. Paul and Pacific RR Co.,*

(318 U. S. 523), *Vanston Bondholders Protective Committee v. Green,* (91 Law. Ed. No. 3, page 175), and *Gardner v. New Jersey,* (91 Law. Ed. No. 6, page 410, 416).

## OPINIONS BELOW

The Opinion of the Circuit Court of Appeals sustaining the Order approving the Plan, decided February 8, 1946, is reported in 153 Fed. Rep. 2d Series, 312, (folio 24, page 184, Transcript of Record Nos. 1108-1111, October Term 1945, Supreme Court).

The Opinion of the District Court on the Order of Approval is reported in 59 Fed. Sup. 417, (also folio 65, page 36, Ex. 2, page 97, Submission Pamphlet, Transcript of Record, Nos. 638-639, October Term 1946, Supreme Court).

Opinion of the District Court confirming the Plan appears in Transcript of Record, Supreme Court, October Term 1946, Nos. 638-9, page 51, folio 85.

The Reports of the Interstate Commerce Commission appear in Transcript of Record Nos. 638-9, Supreme Court, October Term 1946, page 36, folio 65, Exhibit 2, and are reported in 240 ICC 283, 243 ICC 523, 257 ICC 399, 257 ICC 717.

No Opinion was filed by the Circuit Court of Appeals supporting the Orders of Dismissal to which this petition is directed.

## JURISDICTION

The decrees of the Circuit Court of Appeals were entered on April 16, 1947. The jurisdiction of this Court is invoked under §240a of the Judicial Code, as amended by the Act of February 13, 1925 (28 USCA §347).

## STATUTES INVOLVED

The issues involve Section 77 of the Bankruptcy Act, 11 USCA 205, and chapter 324 Public Law 404, Laws of the Seventy-ninth Congress, Second Session, 1946, (5 USCA,

chapter 19, §1009, subdivision (e), Laws of Missouri, Article II, chapter 33, §5289C, Article XII, §2 of the Constitution of Missouri, 1875.

The pertinent part of 5 USCA, chapter 19, §1009, subdivision (e) reads:

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law * * *. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law * * *.; * * * (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

Laws of Missouri, Article II, chapter 33, §5289C is quoted in the appendix of appellees' motion to dismiss the appeals at pages 6 and 7.

Article XII, §2 of the Constitution of 1875 (Missouri) provides:

> "No corporation after the adoption of this Constitution shall be created by special laws nor shall any existing charter be extended, changed or amended by special laws."

## STATEMENT

A complete chronology of the proceedings is appended as Exhibit 1. The following briefer statement focuses the Debtor's complaint:

The Circuit Court of Appeals of the Eighth Circuit had before it Debtor's appeal from the District Court's "Order of Consummation and Final Decree" definitely disposing of Debtor's assets and Debtor's charter, and an appeal from the order of the District Court discharging the Trustee, which latter appeal was taken because it is the order designated "final decree" in Section 77 and is so referred to in the General Orders in Bankruptcy. These two appeals were docketed and dismissed on the motion of the Reorganization Managers and mortgage creditors. Thereby orderly hearing on Debtor's cause in accordance with the law and rules giving a hearing on appeal from final decree was denied.

The petitioner is the corporate debtor in a Section 77 reorganization proceeding. No stockholder of the Debtor has appeared as a party in that proceeding. The Debtor has at all times represented its claim to an equity in its assets that it might retain the equity allotted in a Reorganization Plan, in whatever securities represented, for distribution to its stockholders (Section 77 (e)).

The bankruptcy court (by its Order of Consummation and Final Decree) ordered the corporate charter of the Debtor to be seized by the Reorganization Managers, all of the stock of the Debtor's stockholders cancelled, new stock issued to the Reorganization Managers, new directors and officers elected, and new bonds and shares issued without a vote of Debtor's stockholders. It then ordered the Debtor's property conveyed to the Debtor corporation, and, by later order of January 31, 1947, discharged the Trustee.

The Debtor has been stripped of its assets.

Its charter of existence has been confiscated.

Its books and records have been seized.

It cannot function to communicate with its stockholders.

It is made helpless to rehabilitate itself through corporate action.

Its stockholders cannot use it as a vehicle to re-

acquire its property or any interest therein by purchase.

The respondents are now claiming that the decree authorizing Debtor's seizure incapacitated Debtor from objecting to the decree, by appeal or otherwise, and from employing counsel to present its cause.

There has been one appellate review of the Plan. The Circuit Court of Appeals of the Eighth Circuit considered an appeal from an *Order Approving the Plan.* The Order of Approval was entered by the District Court on March 16, 1945. The Plan so approved had been certified to the District Court by the Interstate Commerce Commission on July 4, 1944, (Supplemental Report October 2, 1944).[1] The Circuit Court of Appeals sustained the Order of Approval on the 8th day of February, 1946. (153 Fed. 2d, 3[illegible])

Pending the consideration by the Circuit Court of Appeals of the Eighth Circuit of the appeal from the Order of Approval, the District Court confirmed the Plan. Thereupon Debtor appealed from the Order of Confirmation. On the 19th day of June, 1946, the appeal from the Order of Confirmation was docketed and dismissed on motion of appellees. The Opinion was to the effect that no substantial question was presented which had not been determined by the Circuit Court of Appeals in its decision on the appeal from the Order of Approval. (Opinion page 87, Transcript of Record, No. 638, Supreme Court of the United States, October Term, 1946.)

The Supreme Court denied petitions for certiorari directed respectively to both Circuit Court of Appeals rulings.

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[1] The Plan first certified by the Commission on November 16, 1940 was based on a record closed several months earlier. The earning picture exhibited to the Commission at the hearing in the spring of 1944 was exceedingly better than the one on which the original Plan was based but it was given practically no weight in the Plan certified July 4, 1944. The improvement in earnings was dismissed as a wartime phenomenon without further significance.

Subsequently and on November 12, 1946 the Debtor filed a petition with the Bankruptcy Court asking it to consider major developments since the certification of the Plan by the Interstate Commerce Commission in July of 1944, and, in a large part, since the District Court's Order of Confirmation which was entered on the 15th day of November, 1945, to the end that large receipts of cash by the Trustees realized during the thirteen years and six months of bankruptcy administration might be accounted and allocated to the creditors' claims in accordance with bankruptcy rules and that the Plan be remanded to the Interstate Commerce Commission so that the demonstrated post-war earning power might be considered by the Interstate Commerce Commission and the Plan reformed in the light of the two corrected factors; (amount of indebtedness determined by the court and up to date estimate of earning power to be revised by the Interstate Commerce Commission)[2] and that the Trustee be directed to discount claims by purchase in order to reduce the total claims against Debtor's estate. (R. 27)

On December 10, 1946 Debtor's motion for accounting and to remand the Plan and a motion of the Reorganization Managers and mortgage creditors for an *Order of Consummation and Final Decree* filed the 2nd day of December, 1946, were heard by the District Court, and on the 12th day of December, 1946, the Debtor's motion to have the indebtedness accounted and recomputed and to discount claims, and to remand the Plan to the Commission for further consideration was denied, and the Order of Consummation and Final Decree was entered. (R. 41)

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[2] The Commission did not fix the effective date of the Plan in its Report of July 4 1944, which says:

> "The Committees propose that the date for giving effect to the Plan shall be left for determination of the court by subsequent order on application of the Reorganization Managers. * * * The proposal * * * is accordingly approved." (Page 86, Submission Pamphlet, Exhibit 2, Transcript of Record in No. 638, October Term 1946, Supreme Court.)

In its Report of October 2, 1944, the Commission again declined to fix the effective date. (Page 94, Submission Pamphlet.) It follows that there is no order of the Commission to qualify the court's duty to make the Plan effective as of the date of final decree on the basis of the equities then evident.

The Debtor appealed to the Circuit Court of Appeals of the Eighth Circuit from the order denying its motion to remand and asked for a stay of proceedings. This was denied. It then applied to the Supreme Court for a stay of proceedings and the application was denied on the 23rd day of December, A. D. 1946.

The Circuit Court of Appeals did not hear the Debtor's plea for a review of the order of the District Court denying the petition to have the indebtedness accounted and recomputed and to purchase claims at a discount and to remand the Plan to the Interstate Commerce Commission for further consideration. On the 11th day of February, 1947, it sustained the motion of the mortgage creditors and the Reorganization Managers to dismiss the appeal and ordered that the appeal "*be dismissed but not affirmed.*" (R.

The Debtor appealed to the Circuit Court of Appeals from the Order of Consummation and Final Decree so entered on the 12th day of December, 1946. This was a ***final dispositive*** order disposing of Debtor's assets and confiscating Debtor's charter.

Shortly thereafter the Debtor appealed from the Order Discharging the Trustee so that there might be before the Circuit Court of Appeals an appeal from the order which is designated in Section 77 as the "*final decree.*"

The Reorganization Managers and mortgage creditors moved the Circuit Court of Appeals to docket and dismiss both appeals (appeal from the Order of Consummation and Final Decree and appeal from Order Discharging Trustee). (R. 209, 235)

On the 16th day of April, 1947, the Circuit Court of Appeals without opinion docketed and dismissed the appeal from the Order discharging the Trustee (No. 13545) and dismissed the appeal from the Order of Consummation and Final Decree (No. 13521). Both motions were argued together. (Not because of any defect in procedure.) (R.

From these Orders of the 16th day of April, 1947 petitioner asks for relief by this petition for certiorari.

Twenty-one months intervened between the approval of the Plan of Reorganization and the Order of Consummation and Final Decree. During this time the entire basis for a forecast of Debtor's future was changed materially for the better. Cash and cash equivalents had so accumulated that the Trustee had in hand more than forty million dollars available for distribution to creditors either in payment of principal or in compromise of claims (over and above distribution actually made). The economy of which the Debtor's property was a part had shown a great revival to a degree of vigor and health that created a demand for the services of Debtor's property greater than it was in the pre-Depression era when the earnings distributable to interest and dividends exceeded the fixed charges by an average of more than nine million dollars a year. This increase was known to the court, the subject of frequent reports. The interest market on the kind of securities that Debtor could issue had dropped materially from the pre-Depression levels. It became apparent that the cash and the capitalizable assets in the Trustee's hands were more than sufficient to recoup the creditors for the unpaid principal of their claims, a restoration to the creditors of all money withheld by the court from cash realized and constructively applied on their claims, interest on the withheld money, fair and equitable interest on the unpaid portion of the principal of their claims, full recognition of the unsecured creditors, and a substantial equity to the Debtor, all showing changes of such magnitude that no determination of the equities of the Debtor at the time of Final Decree could be arrived at without a reconsideration of the facts then in the record before the bankruptcy court, supplemented by such expert testimony as might be available to interpret the facts to the court and the Commission. These were the matters and things set forth in the petition filed by the Debtor on the 12th day of November, 1946, asking to have the indebtedness accounted and recomputed, and to discount claims, and to remand the Plan to the Commission for further consideration. (R. 27)

The Annual Reports of the Trustees of the Debtor's estate show net earnings of 132 million dollars (to the end of 1945). They show an additional 53 million dollars realized from the conversion of assets (not including receipts from outright sales). Though repeatedly requested, no effort whatever was made by the bankruptcy court to make a determination of equities or of the effect on creditors' claims of the realization by the Trustees of such available funds, and apply equitable principles to the allocation thereof.

Subsequent to the time when both the District Court and the Circuit Court of Appeals had given consideration to the question whether the Commission's Plan was supported by the evidence, there had been a change in the law of the land giving a right to a judicial review of any administrative order and requiring its correction if not supported by ***substantial evidence.***

A material change, adverse to the Debtor, was made in the Plan by the incorporation of a provision for the confiscation of its charter. The Debtor was wholly denied a hearing thereon before the Interstate Commerce Commission.

The Commission ruled:

> "* * * Objections were filed with us by the debtor, with request for a hearing; but these either go to matters not involved in the application or are similar to objections filed with and overruled by the court. No hearing before us appears necessary. We have made the required investigation." (R. 105)
>
> (From second par. of Third Supplemental Report of ICC, Div. 4, Dec. 4, 1946)

The observation that the court had ruled on the objections is misleading. Debtor had asked the court not to send the inquiry to the Commission, knowing full well that the court could not so rule until after the Commission had first considered. All the court had done was to order the

matters involved submitted to the Commission. That is not the situation that the Commission said existed.

The Debtor filed in the District Court (December 20, 1946) a petition for rehearing of the Order of Consummation and Final Decree and was by that court held to have no right to be heard on a petition for rehearing. We quote the five provisions in the Order: (R. 153)

> "1. All controversies concerning the Plan have been conclusively determined and it is not now competent for the Debtor to reopen any of the issues so determined.
>
> "2. This Court is without power or authority to entertain or consider said motion of the Debtor for rehearing.
>
> "3. The Debtor now has no interest in the subject matter of the litigation and is without standing in this Court.
>
> "4. Said motion of the Debtor for rehearing fails to state any case which would justify reconsideration of the determinations heretofore made.
>
> "5. The motion of St. Louis-San Francisco Railway Company and John W. Stedman, et al., as the Reorganization Managers, to deny the Debtor's motion for a rehearing and reconsideration of the consummation order and final decree entered December 12, 1946, is hereby sustained." (R. 160)

In its consideration of the Debtor's appeal from the Order of Approval the Circuit Court of Appeals was asked to review the evidence in the light of the Interstate Commerce Commission's special findings and decide whether there was lawful evidence to support the Commission's findings. Its special findings read as follows:

> "1. A finding stating the total amount of creditors' claims in dollars for which new securities are allotted in reorganization.

The amount is \$356,457,561, after deduction for proposed distributions of cash.

"2. A finding stating the total book cost of debtor's assets, less current liabilities and adjusted credits, found and used by the Commission as a factor in determining the value of the debtor's assets.

The book cost of the debtor's total assets less current liabilities and unadjusted credits is \$397,-015,888.73. See No. 3 below.

"3. A finding stating the weight given such factor in a final determination of capitalization of debtor's assets.

None. The sum includes noncapitalizable assets.

"4. A finding stating the reproduction cost less accrued depreciation of the debtor's road, structures and equipment, as of January 1, 1940, brought down to January 1, 1944, by appropriate additions and deductions of additions to capital assets and retirement of property and equipment depreciation set up since January 1, 1940.

Not found. See above in this report.

"5. A finding stating the applicable period used for prices of material and labor in finding cost of reproduction new.

See above in this report as to estimate as of December 31, 1936.

"6. A finding stating the amount of accrued depreciation of road and structures deducted, if any, in finding cost of reproduction new.

None.

"7. A finding stating what, if any, going-

concern value is included in the finding of cost of reproduction new.

None.

"8. A finding stating the weight given the final cost of reproduction new less depreciation of road structures, and equipment in determining capitalizable value of the debtor's assets.

Not possible to state, since the Commissioners approving this report have not necessarily arrived at their agreed conclusions after assigning the same weight to each component part of all the relevant evidence.

"9. A finding stating what future earning power the Commission may use in arriving at the capitalizable value of debtor's assets.

See above in this report.

"10. A finding stating what weight such future earning power is given by the Commission in determining the capitalizable value of the debtor's assets.

See above in this report, and also response to request for finding No. 8.

"11. A finding stating to what extent, if any, debtor's road and structures are undermaintained.

See above in this report."

(Transcript of Record, Supreme Court, October Term, 1946, No. 638, Exhibit ~~2~~ 65, fol. 2, Submission Pamphlet, pages 89, 90)

The response of the trial court to a similar request was as follows:

"* * * the Court believes that the Commission has probably conducted as exhaustive a consideration of the questions of valuation and capitalization as is physically possible. * * * The Court can find no ex-

ception with the record as it now stands sufficient for it to be able to say that the Commission has failed to consider any of the kinds of evidence deemed to be material under the Act by the Supreme Court, or to say that the Commission has not given proper weight and painstaking consideration to the various elements of value in its determinations. Rather, it is the present opinion of this Court that the Commission has properly concluded from the facts of record the question of value. * * * Certainly there is nothing arbitrary in the Commission's determination here of the probable future earnings and the sound financial structure which those earnings will support."

(Vol. XII, Reorganization Proceedings, Case 7004, pages 7448-9) (Pages 105-106, Ex. 65, fol. 2, Transcript Record in No. 638, Sup. Ct. Oct. Term 1946)

On appeal to the Circuit Court of Appeals it was pointed out to the Circuit Court of Appeals that under the Commission's Special Findings the real basis for the Plan was an assumption of future earnings; that every witness testified to a future earning power sufficient to establish a continuing equity in the Debtor. However, the Circuit Court of Appeals took the view (which was in reality the view of the District Court) that if the Interstate Commerce Commission heard all the testimony its duty was performed. The Court said:

"In view of the very extensive investigation by the Commission of every element or factor having any conceivable bearing on the question of future earning capacity, including the condition and nature of the physical properties, the past earning record, and all circumstances which bear upon the question of future earnings or value, it cannot reasonably be said that the Commission assumed anything."

(Transcript of Record, Supreme Court, October Term 1945, Nos. 1108-1111, page 190, 191)

Late in the second session of the Seventy-ninth Con-

gress, Public Law 404, chapter 324, §10, subdivision (e) was enacted. Under this Act an aggrieved party was given the right to require the trial court to consider whether any administrative finding was based on evidence or merely evolved from the individual notions of the Commissioners. The test of that statute is a different test than the one applied by the Circuit Court of Appeals of the Eighth Circuit on the interlocutory order of approval of the Plan.

Debtor's claim is that under this new statute it has the right to have a decision whether a finding of future earning power contrary to the testimony of every witness before it testifying on the subject can be said to be grounded on "substantial" evidence.[3]

The original Plan contained alternative provisions for divesting Debtor of its equity—(1) conveyance to a new corporation; (2) sale; (3) retention by old corporation.

No definite purpose to use the old corporation was declared until long after confirmation of the Plan. No definite issue could be raised on the propriety of the seizure of the old corporation until it was ordered by the court. To make the provision definite and controlling was to make a clear and important change in the Plan. Until the change was approved by the Interstate Commerce Commission it did not emerge as a part of the Plan. Application for such a needed order was made to the Interstate Commerce Commission by the Reörganization Managers and mortgage creditors.

The actions of the District Court adverse to the Debtor had all taken place since the decision by the Circuit Court of Appeals on February 8, 1946 affirming the order approving the Plan and could not have been considered and decided by the Circuit Court of Appeals at that time, and on those questions the petitioner has had no appellate hearing.

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[3] The Honorable James C. Hutcheson, Jr., in his Alexander F. Morrison lecture of September 26, 1946 before the State Bar of California hails the law of June, 1946 as a corrective of the practice of the judicial validation of administrative orders based on assumed expertness and lacking substantial evidence.

## ARGUMENT

The beneficiaries of the final order of the bankruptcy court can now be said to be in possession of all Debtor's assets. They assume to have acquired the Debtor's corporate charter. This neither bars nor weighs against Debtor's right to have the proceedings corrected, the weaknesses of respondents' title exposed, and Debtor's equity recognized.

The Supreme Court did not hesitate to enforce the claim of Boyd in *Northern Pacific Ry. v. Boyd,* 228 U. S. 482, notwithstanding that the reorganization therein involved had been completed, new stock subscribed to, new securities publicly issued, and years of operation had intervened.

The inability of the Debtor to support its application for a stay of proceedings by the tender of a bond for a large amount, or to secure a stay, does not bar its right to a review. *(In re Lilyknit Silk Underwear Co. Inc.* 73 Fed. 2d, 52 (C.C.A. 2d Circuit).)

## QUESTION NO. 1

There is no ground for contending that any national policy declared by Congress requires the seizure of the Debtor's charter. Subsection (b) of Section 77 defines what a Plan *may* be. Undoubtedly in a proper case wherein the Debtor is allocated securities or shares in reorganization, it may consent *voluntarily* or pursuant to a required condition of securing securities, to the recasting of its stock ownership if by requisite vote its stockholders assent. A reorganization with that feature can well satisfy the definition of a reorganization plan.

There is no warrant for the assertion that Congress intended to give to the Interstate Commerce Commission or the court of bankruptcy the power to seize the Debtor's charter. Had Congress had such a purpose, the bankruptcy court would not have been used to supply the judicial power to consummate a reorganization. Whatever interest the public has in reorganization can be fully satisfied without confiscating the Debtor's charter. In order that a public

policy may override local laws the overriding must be essential to the carrying out of the policy and the purpose to override must be clear.

*Savage v. James,* 225 U. S. 513, at 535.

Up to date the bankruptcy power has been no more broadly defined than in *Stellwagen v. Clum,* 245 U. S. 605, at 617. On that authority it can properly be said that the power extends to all relations between the debtor and his creditors respecting *his assets.* No state law can add to the power.

On the authority of *Louisville Bank v. Radford,* 295 U. S. 555, we believe the power is subject to the Fifth Amendment to the Constitution.

The Debtor deposited all its assets with the bankruptcy court. That court has jurisdiction to deal with those assets in satisfaction of the lawful claims of creditors.

A right to exist as a corporation is not an assignable asset. It cannot by any device be subjected to the claims of creditors. The Debtor's right to exist was not surrendered to the bankruptcy court to be disposed of by it. No creditor had any claim to it.

*Memphis v. Commissioners,* 112 U. S. 609.

*New Orleans v. Delamore,* 114 U. S. 501.

*Julian v. Central Trust Co.,* 193 U. S. 93, at 106.

*Vicksburg v. Water Works,* 202 U. S. 453.

*Missouri v. East Fifth St. Ry.,* 41 SW, 957.

The bankruptcy court has no jurisdiction to dispose of it. Therefore, sections 1.04, 3.01, 3.03 of the Consummation Order and Final Decree exceeded the court's jurisdiction. (R. 43, 47, 49)

The Debtor, if its charter is not confiscated by the bankruptcy court, is a corporation organized under the

laws of Missouri, qualified to do business in many States. Out of its funds it has paid large fees to so qualify it. (Estimated to exceed $250,000.00). It is a common carrier. It has an organization of directors and officers. It has stockholders with whom it has the usual corporation-stockholder status. It can provide for further contributions to capital. It can acquire securities in other common carrier corporations.

Throughout the reorganization proceedings it has, to the best of its ability, attempted to protect the rights of every creditor and stockholder so far as in its keeping.

Should it be that the Plan remains undisturbed except for the seizure of Debtor's corporation and the property turned over to a new corporation, then the Debtor by the purchase of the new stock provided in the Plan would be in an immeasurably better position because of the reduced debt than it was before the initiation of the proceedings. Certainly this would be so if the holders of new securities could be estopped from claiming more value for them than they have asserted those securities to have in argument before the District Court and the Court of Appeals.

The Debtor's right to exist as a corporation is a status which it cost money to acquire and is certainly of as great value to retain as it is for the creditors to seize. We doubt if there is another example in civilized comparative jurisprudence where in the process of enforcing a creditor's claim, the assets of a debtor are taken and given to a creditor and then the debtor himself is liquidated.

It has been sought to sustain the seizure by reference to a Missouri statute. (Laws of Missouri, Article II, chapter 33, §5289C). It will be noted that this statute says that Reorganization Managers may vote the stock of a debtor corporation pursuant to the *order of a court of competent jurisdiction.* The real question is whether the bankruptcy court has any jurisdiction over a status which is not an asset and to which creditors can have no claim. If it has not, the statute does not apply. (Supra, page 5)

Another obstacle to the application of the Missouri

statute would be that it is an attempt at the legislative destruction of a stockholder's right to be a stockholder in a corporation. The Constitution of Missouri in effect at the time of the incorporation of the Debtor (1916) contained no such reserve power. (Supra, page 5)

However, the whole question depends upon Federal power and the purpose to exercise it. We submit there was no congressional purpose to exercise any such power, that our charter could not be seized without compensation under any power, and that the bankruptcy power confers no such jurisdiction. This question was presented to the Circuit Court of Appeals in an orderly way and the Debtor should have been heard upon it. The dismissal of Debtor's appeal was contrary to the process of appeal as established in the rules and statutes applicable thereto.

QUESTION NO. 2

In these proceedings the Commission responded to a request for special findings (quoted pages 12, 13, 14, supra). It did not find reproduction cost, or actual investment entitled to capitalization, and actually found no estimate of future earnings. The Commission report discusses what the capitalization would be if certain earnings are realized. It certainly does not attempt to say what earnings may be expected to be realized. The Plan proposed by the Commission fixed a total capitalization in stock plus bonds aggregating 247 million dollars. This figure represents some kind of a value. It is to be noted that the final aggregate of authorized debt and shares was 255 million dollars.

At the time of the submission of the Plan to the Commission at the last hearing it was known that there had been an accumulation of cash. The Commission explained that there were uncapitalizable assets, citing the case of *Louisville & Nashville RR Securities,* 76 ICC 718. This was equivalent to saying that the cash was not capitalizable.

The claims against the Debtor's estate on May 16,

1933, when the petition was filed, aggregated not to exceed 285 million dollars of secured claims plus approximately $400,000 (estimated) of valid unsecured claims.

Through operations from May 16, 1933 to December 31, 1945, the trustees received in cash approximately 181 million dollars more than was paid out for the cost of operating the property. Of this amount 53 million dollars does not show as earnings on Trustee's reports because it was deducted for depreciation, amortization and exhaustion. When, in the valuation of our property, we are denied investment value or reproduction cost, we cannot be charged with depreciation and exhaustion in years in which we are charged with the highest possible cost of maintenance in order that the earning power be not reduced.

It follows that the court has had assets aggregating 428 million dollars out of which to satisfy the claims. The only adjustment to this figure which can be disputed is the deduction of approximately 32 million dollars in excess profits and income taxes since *in the period of the earnings* the immediate economic realization was that of the creditors whose rights became *in rem* rights upon the filing of the petition. The current decisions imposing the tax upon the recipient of the "economic realization" would not justify excusing the creditors from the burden of these payments.

*Mallinckrodt v. Nunan*, 146 Fed. 2d 1.

In a large number of cases the principle of the *Mallinckrodt* case has been applied by the tax court in identifying the taxable person or corporation, the test being "who has the economic realization", i. e. the right to demand payment to himself actually or constructively.

The Trustee Report for the period ending December 31, 1945, page 5, shows that 35½ million dollars of the money so received was used for additions and betterments, and approximately 105 million dollars disbursed to creditors. Of this latter amount part was used to pay Equip-

ment Trusts and a matured bond issue, part to compromise the claims of the Reconstruction Finance Corporation and the Railroad Credit Corporation. A small part was paid for interest on the bond issue that was retired, a small part was properly paid on interest accumulated prior to May 16, 1933, and substantially all of the balance was paid out on orders directing its application to interest during administration but reserving the right to reallocate such payments on future consideration.

The Commission and the bankruptcy court have assumed that the claims of the mortgage creditors were accumulating interest at the contract rates during the whole period of administration. The Debtor and the unsecured creditors have consistently resisted this claim. Neither the bankruptcy court nor the Circuit Court of Appeals have given any consideration whatever to the question of bankruptcy administration involved, and have refused to concede that any such problems exist.

In *Sexton v. Lloyds*, 219 U. S. 339, certain definite propositions were established—

First, a secured creditor may take his security out of the common fund and apply the earnings up to the time of foreclosure of his securities to the payment of interest accruing on his claim. If the earnings plus the amount realized on foreclosure do not exceed the maximum of principal and interest, there is no excess to return to the common fund.

Second, if the secured creditor wishes to make a claim against the common fund for a deficit, he cannot develop a deficit by applying income on his securities during administration to interest accumulated during administration. He can apply it to principal and he can apply the proceeds of his foreclosure sale to principal, and if anything remains due him he can claim against the common fund.

Third, the secured creditor who has security but desires to resort to a common fund for any purpose cannot

have a payment on interest during administration until the principal of the claims of all creditors having a claim upon that fund is paid in full.

The creditor is vested with an equitable right *in rem* at the filing of the petition. He has no contracts with other creditors. His right cannot be diminished by the accrual of legal rights in favor of some creditor against the debtor. Certainly this is the basic reason for the Rule and it does not rest on convenience of the court.

The above Rules were clarified by Judge Walter H. Sanborn in the *Board of County Commissioners of Shawnee County, Kansas v. Hurley, et al.,* 169 Fed. Rep. 92, and they were revitalized in *Vanston Bondholders Protective Committee v. Green* (91 Law. Ed. No. 3, page 175).

The allocation of the huge fund available to credit on the creditors' claims will obviously make a great difference in the amount due each creditor on the principal of his claim at the time of final decree. In the case of the Fort Scott Bonds the earnings of their Division on the basis of the agreed formula for allocating earnings exceeded the principal.

The court retained certain sums for additions and betterments (approximately 36 million dollars). That retention had all the characteristics of a borrowing from the creditors, giving them a new claim for the money so withheld on a new interest basis commensurate with the rate at which the money was obtainable in the market on receiver's certificates.

In bankruptcy administration the Debtor can have no recognition until after a proper equitable allowance has been made to creditors for interest during administration. Certainly there should be no allowance for interest on that part of the principal which the cash realized by the court pays.

Consideration should be given to the delays resulting from controversies carried out by the creditors them-

selves and the necessities of administration. Such interest should be fixed by the application of equitable principles. An accounting is necessary and at the end of the accounting consideration should be given to the interest on new securties allowed as compensation for the use of the principal remaining unpaid. No court can tell what a fair Plan should be without deciding how much income in the aggregate should be set aside as fixed and contingent interest or stock dividends to properly compensate the creditors for their unpaid claims. In reaching this aggregate a vital question for decision is whether the unpaid interest should be compensated for on as high a rate as the compensation deemed just and equitable for the unpaid principal of the claim.

At the time of the approval of the Plan the Debtor urged the court to give consideration to these problems of accounting. It asked the Circuit Court of Appeals to consider the problems when it had before it the appeal from the Order of Approval. In its petition of November 12, 1946, Debtor asked the court to give consideration to and adjudicate the problems involved. This petition was denied. The bankruptcy court consistently refused to recognize that any such questions existed.[4]

The petition of November 12, 1946, was not like the first pleading in which a lawsuit is initiated. It was a petition grounded primarily on facts already known to the court on the record. No written petition was required. It

[4] Without a proper determination by the court of the extent to which the large receipts of cash reduce the principal of the mortgage claims, and the making of the proper adjustments on interest, and the determination of the aggregate amount of annual income that will satisfy the creditors' priorities that have been so determined, it cannot be determined what future level of distributable income is necessary to demonstrate an equity in the Debtor. That figure, when determined, is the crux of the problem.

The observations made by the Commission in discussing the capitalization of income (at page 80 of the Submission Pamphlet) show that even if it should feel that future distributable income would exceed the amount necessary to compensate the mortgage creditors, it would not show an equity in Debtor. The theory of the Commission is that it must be capitalized at a percentage rate producing a capital value less than the principal of the creditor's claims. We believe this to be an entirely erroneous approach.

is doubtful even if any oral request was necessary. The problems were essential problems in the performance of the court's trusteeship, and at all times should have been as well known to the court and its trustees as to the Debtor.

The accounting feature of the petition was framed in accordance with approved forms for suing for an accounting. *(Morris & Co. v. Whiteley,* 183 Fed. 764; *Luther P. Stevens, et al., v. Berry Schools,* (Ga.) 3 S. E. 2d, 68, at 71.) A plaintiff entitled to an accounting cannot always say that something is due. He has said enough if he says complicated transactions have taken place which in equity require accounting and that he believes the accounting will show something substantially to his advantage.

It is certain that the application of these bankruptcy principles would result in the adjudication of amounts due for principal and amounts due for interest vastly less than the sum total of 376 million dollars which had been assumed by the Plan to be due as of December 31, 1945. The duty to make the accounting rests with the court and trustee. The Debtor could not make an independent accounting unless the court should establish a fund out of which Debtor could make definite commitments for payment of the cost.

The Debtor believes that the indifference of the bankduptcy court to the existence of these accounting problems was due to its reading of the case of *Ecker v. Western Pacific,* 318 U. S. 448, *Group of Institutional Investors et al., v. Chicago, Milwaukee St. Paul and Pacific RR Co.,* 316 U. S. 659, as meaning that the accomplishment of a reorganization plan does not require the bankruptcy court to concern itself with the usual rules of bankruptcy administration, that the disregard of traditional factors governing debtor and creditor relationships upon which a Plan is formulated excuses the necessity of determining at the time of final decree what is actually due from the Debtor's estate to the creditors.

The power to use funds to compromise claims in order

to accomplish the public policy declared in §77 seems to follow from *Gardner v. New Jersey,* 91 Law Ed. No. 6, 410-416.

These questions could not have been decided by the Circuit Court of Appeals on February 8, 1946.

QUESTION NO. 3

In support of Debtor's objections to the Plan it asked the bankruptcy court to examine the evidence to see whether there was any evidence upon which to base an assumption of future earning power sufficient to support the declaration that Debtor had no equity.

It was not the court's function to find future earning power. Its duty was to see if there was proper evidence to sustain what the Commission had done.

The Commission dodges a finding as to every factor upon which it is supposed that the estimate prescribed by Section 77, subdivision (e), is based. (See findings pages 12, 13, 14, supra.) It is apparent from the report of the Commission that some basis of earning power is assumed.

At the time of the argument of the objections to the approval of the Plan the attention of the district court was called to the fact that every single witness who testified as to future earning power gave testimony favorable to an earning power which demonstrated a continuing equity in the Debtor.

Kurn, Trustee, testified to a future earning power of 23 million dollars distributable in interest or dividends. (R. vol. III, 1280.) Kurn was a Trustee and had been the chief executive officer for many years. His testimony was presented on behalf of all the Bondholders' Committees and the Debtor. ("R" refers to printed record in No. 12471, CCA 8th Circuit)

Fritch, an independent operator, testified to an earning power of 15 million dollars distributable as interest or dividends based on a pattern of business following the

lines of the period postwar One.[5] (Appendix to brief of appellants in 13107, CCA, filed Sept. 4, 1945.) (Transcript record in 1108, Sup. Ct., Oct. Term 1945, page 73)

At the time of the last hearing before the Commission it was evident that the huge national debt was going to force a different pattern of economy to which the railroad business bears a direct relationship. A forecast of future earnings depends primarily on what that economy will be for a determination of the gross business. Nobody ventures to forecast operating expenses more than a year or two in advance. There is perhaps some validity in the long term forecasts of economists as to national income or gross business. There are various estimates of different phases of the same general problem. Three witnesses were produced by the Debtor to testify to an expanded gross business forecast on the basis used by the forecasters of national income. (Appendix to brief of appellants in 13107, CCA, filed Sept. 4, 1945; Fritch, page 93; Maggio, page 104; Wolkiser, page 124). All of them testified to a greatly increased gross. They were not asked to testify to operating expenses nor will any responsibile expert undertake it except in the light of past experience. The past experience was all on the record, and, applying that past experience of operating costs, it was made evident that the gross should yield an income wholly adequate to demonstrate a large equity in the Debtor.

There is only one other factor to consider in the determination of future distributable income, and that's a factor wholly in the hands of the Interstate Commerce Commission. Public policy, as declared in the Constitution, which denounces confiscation, and the history of the Transportation Act require the Commission to permit rates to be charged which will fairly compensate for the service rendered to the end that, so far as the railroads are able to secure the business, they can earn a fair return. In order to destroy the probative effect of the testi-

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[5] Between the time Kurn gave his testimony and Fritch gave his the Federal tax item had become much greater. This accounted for the greater part of the difference of $9,000,000 in their estimates.

mony of all witnesses it was necessary for the Commission to assume that the declared public policy committed to the Commission for enforcement would not be carried out by the Commission.

We have set forth above (page 14) the language of the trial court in disposing of Debtor's contention that there was no evidence to support the Commission's Plan. We believe the proper interpretation of the court's language was—

> "The Commission has heard all the testimony in an appalling record and thus its duty was discharged."

It is certain that the court had no function to make a finding of any ultimate fact and its apparent concurrence with the Commission's views was *functus officio* as a finding.

The problem was then presented to the Circuit Court of Appeals of the Eighth Circuit and the language of that court is quoted above, page 15. The attitude of that court was likewise to hold that when expert commissions had heard all the testimony there was nothing for the court to review.

It is not strange that the court finds it difficult to identify the kind of testimony that can constitute proof of future earning power. There is much reason for saying that a conclusion based on an estimate of future earning power is wholly arbitrary. If, however, we assume that it is factually determinable, there is every reason why it should be based on testimony of witnesses and not merely guessed at.

In testimony before the Senate Interstate Commerce Committee, Commissioner Porter stated that the Commission took the testimony of witnesses as to future earnings and then applied its expertness. This testimony showed a consciousness of the right process, but in this *Frisco* case there was not one word of testimony other than that we

have above referred to which can properly be designated the testimony of a witness as to future earnings.

At the time of its Final Report the Commission had before it the Report of its own experts in the Bureau of Transportation, Economics and Statistics submitted under date of October, 1944. This is a long report but a glance at page 55 shows that those experts advised the Commission that there would be a great increase in national income and consequently in the income of Class One railroads for the years 1947, 1948 and 1949 as compared with the low income of the Depression years. This report wholly confirmed the forecast of the only witnesses who testified as to the increased gross.

As appears from the Trustee's report of December 31, 1945, the gross earnings upon which the 1940 report of the Commission was predicated were running between fifty and sixty million dollars per annum, and this can be compared with a gross of ninety-five million dollars per annum in 1946. The war earnings reached one hundred and twenty-one million dollars gross in 1944.

Judge Frank of the Second Circuit has used picturesque language in describing an administrative finding of value not cogently tied to definite evidence. *(Old Colony Bondholders et al, v. New York, New Haven & Hartford,* 2nd Circuit, January 13, 1947) In all seriousness we believe that his language describes the process by which Debtor's equity in this case was found to be without value.[6]

Whatever the situation was on February 8, 1946, when the Court of Appeals spoke, it seems to have been changed by 5 U.S.C.A., chapter 19, §1009, subdivision (e) enacted in mid '46. And under that law, which requires substantial

[6] The original Plan certified by the Interstate Commerce Commission was based on testimony submitted in November, 1939, and was put out July 6, 1940. The real basis for the Plan was the testimony given at that time. The Commission found that the stock had no value. Meantime in a coordinate branch of the Government the financial condition of the Debtor was investigated by the Tax Court, which held that the stock was *not* worthless in *1940*. (See *In re Milton A. Holmes v. Commissioner, Memorandum Decision*, par. 7315M, CCH)

evidence to support an administrative order, the Debtor was entitled to have the record considered by the bankruptcy court and, if for no other reason, remanded to the Commission for further hearing at which the current story of Frisco operations would wholly refute the guess made in 1940 and repeated in 1944. Under that law there must be a substantial evidence to support a finding. See Note 2, page 2.)

If, as we believe, the provisions of 5 USCA, chapter 19, §1009, changed the standard by which the courts must judge the validity of the Interstate Commerce Commission's finding of value, then it constitutes a vital change in procedures under Section 77 and Debtor is entitled to the benefits of that change.

*Carpenter v. Wabash Railway Co.,* 309 U. S. 23.

*Vandenbark v. Owens Illinois Co.,* 311 U. S. 538.

*Hines v. Davidowitz,* 312 U. S. 52.

*Fleming v. Mohawk Wrecking & Lumber Co.,* 91 Law Ed. No. 13, page 991.

The order dismissing the Debtor's appeal to the Circuit Court of Appeals in effect denied its right to have this question determined.

### QUESTION NO. 4

Justice Holmes made it clear in *Sexton v. Dreyfus* that when a bankrupt turned his property in to the bankruptcy court, the rights of the creditors became rights *in rem* in proportion to their claims, and that interest could not be accumulated in favor of one creditor to increase his claim at the expense of another. The refusal to allow interest was not due to mere convenience. It was due to the fact that certain rights were fixed as between creditors and that no change of the legal relationships between the debtor and the creditors could disturb the relationship between the creditors themselves. This was the doctrine restated by Judge Sanborn in *Board of County Commis-*

*sioners of Shawnee County, Kansas, v. Hurley, et al,* supra.

We believe that this court in *Vanston Bondholders Protective Committee v. Green,* page 3, supra, has, since February 8, 1946 repromulgated the basic equitable reasoning of *Sexton v. Dreyfus.* On the basis of that reasoning Debtor had desired to say to the Circuit Court of Appeals that the unsecured creditors secured a vested right *in rem* when the petition was filed and were entitled to be paid before any allotment of securities is made on account of interest to other creditors. There were ample assets to pay the principal of secured claims, and unsecured claims. It is not in accordance with bankruptcy administration to do as has been done, to wit, accumulate interest on mortgage claims, pay that interest before making any payment on the principal of the claims of unsecured creditors, and appropriate the one million dollars of unmortgaged assets to the payment of mortgage creditors, all to the total exclusion of the unsecured creditors.

QUESTION NO. 5

The Plan when certified in 1944 provided that a new corporation should be organized to take over the property, or it might be sold, or it might be reconveyed to the old corporation. There was no Federal policy which required any one of the three alternatives. It was a matter left entirely to the jurisdiction of the bankruptcy court. At the time of the hearing in the Circuit Court of Appeals on the order of approval there was no way of telling that either the wrongful provisions as to sale or the wrongful provision which might turn out to be a seizure of Debtor's corporation would be insisted on.

The making of the seizure of the Debtor corporation mandatory was a definite change in the Plan in an important feature. The change required Interstate Commerce Commission approval. The Reorganization Managers and the mortgage creditors made application to the ICC. Debtor received notice of the application and filed an answer and asked to be heard. The Commission held it

had no right to be heard. (Commission's language quoted page 11, supra.) This was a denial of due process and was a problem which should have been considered by the Circuit Court of Appeals on the appeal from the Final Order.

#### QUESTION NO. 6

It may be conceded that no appeal lies from a refusal to grant a petition for rehearing, that the granting of a petition for rehearing is discretionary. However, that discretion is a legal discretion. The right to file such a petition and be heard is a part of due process under the law of the land. Denial of that right can be considered on an appeal from the order sought to be reheard, *(Fairmount v. Club,* 287 U.S. 474; *Libby v. Mamskold,* 115 Fed. 2d, 786) and the action of the bankruptcy court in refusing to hear the petition for rehearing was brought up to the Court of Appeals on the record and should have been heard by that court. The motion to deny Debtor's petition for rehearing was frivolous. The following authorities declare the rule:

> *Berens v. Berens,* 30 Fed. Sup. 869.
>
> *In re Amsterdam Brewing Co.,* 35 Fed. Sup. 618.
>
> *Federal Rules Service,* 9th vol., page 43, citing *Bartlett Cement Co. v. Prudential Insurance Co.,* Northern District of Ohio; *Klages v. Cohen,* page 46.
>
> *3 Federal Rules Service,* page 66.

Notwithstanding, the bankruptcy court denied the petition for rehearing, using the language quoted at page 12, supra. This was a denial of due process.

May it be remembered that the motion for rehearing had not been set for argument and it was made clear on the record that the motion for rehearing was not being argued and submitted, the hearing was solely on the question whether a *motion to deny* the petition for rehearing could be entertained and granted.

## CONCLUSION

The disaster to Debtor was initiated by an Interstate Commerce Commission valuation predicated on future earning power assumed by the Commission without supporting substantial evidence. It culminated in an order divesting Debtor of all assets and confiscating its charter.

In the intervening period of two years not a single step to improve the Debtor's status was taken pursuant to the principles of equity governing trusteeships and the principles governing bankruptcy administration, nor has the power to do so been recognized or the problems, thereby presented, judicially considered. We believe this is because the earlier decisions of this Court in the *Ecker* and *Milwaukee* cases were read by the lower courts to require their attention to be directed entirely to the producing of a reorganization plan, and to prohibit them from giving possible attention to the use of assets for the purpose of compromising and paying claims in advance of formulating a plan. This attitude persisted even after the Senate Interstate Commerce Committee had pointed out the breach of duty in not availing of the opportunity to discount claims using the assets in hand.

We have been met with the stock answer: "Look at the stock and bond quotations on the new securities. They do not pay the creditors in cash or its equivalent." At the present writing the Frisco properties would so be valued at 103½ million dollars. The figure is absurd. It is obviously an unreliable figure. For years this Court has recognized that the assets of a railroad as a going concern cannot be valued by assuming a sale to a possible purchaser. For the same reasons it cannot be valued by stock market sales. To one who has confidence in the persistence of private enterprise in America there has never been a time when American business could be bought on the market cheaper than it can be today. If present prices were a true measure of what is hoped for, every builder of a new enterprise could look forward to the loss of the greater part of his investment the moment his plant is

put in operation. The market test is unreal. There are a multitude of factors which show the illogic of the test. Why, if a first mortgage is bid at 84, is there any value at all for junior securities?

The present day market price of the securities of railroads in reorganization is a reflection of the apparent opinion of the Commission and the courts as to value. It is circuitous to reason that a low price induced by wrong action justifies the action. When the right decision as to value is reached by the Commission and the court the price will reflect it as soon as the public is informed of the change and when the pressure on prices of all securities diminishes they will rise. There are a multitude of factors affecting the market for stocks and bonds which can have no weight in the judgment of a business man whose purpose is to build or acquire an enterprise with which he expects to meet the future. The great value of the Frisco enterprise is in the stock. The market for it will be depressed because it is held for a period of five years in a voting trust.

The present day demonstrated earning power of the Frisco is greater than is required to pay fairly established interest payments and dividends on all the securities that are needed to give the creditors the income for which they contracted.

At no time has Debtor asked that the creditors be deprived of their first claim to the assets and their first claim to the earnings to the full extent necessary to compensate them for the unpaid part of the debt due them. There is no difficulty in giving them securities which will insure that result.

The Debtor respectfully asks:

First, that the writs of certiorari issue and the Circuit Court of Appeals be directed to hear the questions involved in Debtor's Appeals to the extent that they were not passed upon in its decision on the Order of Approval of February 8, 1946; or,

Second, in the alternative to issue its writs of certiorari and consider the questions upon which the Circuit Court of Appeals should have given decision, and, to that end to hold that (1) the bankruptcy court had no jurisdiction to confiscate the Debtor's charter; (2) that the record upon which the Commission formulated the Plan does not contain substantial evidence upon which the Commission was justified in basing its conclusions; (3) that the amount of indebtedness to be recognized in new securities should be recalculated in accordance with equitable principles and the Plan modified accordingly; (4) that the Commission be required to review the earning power of Debtor in the light of presently known conditions governing that earning power; and (5) for such other and further relief as to the Court may seem proper.

Respectfully submitted,

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July, 1947.

## EXHIBIT 1

## CHRONOLOGY

On November 1, 1932, a bill of complaint was filed by Hobbs Western Company, plaintiff, purporting to represent all of the Debtor's creditors, asking for the appointment of a receiver of Debtor's properties.

The bill alleged, inter alia:

> "Although the property and assets of the Railway Company at their fair value are greatly in excess of the Railway Company's liabilities, yet at the present time the Railway Company is unable to pay its obligations as they mature in the regular course of business or otherwise to provide for them." (Vol. 1, Receivership proceedings, page 25)

On said date a receiver was appointed to take possession of Debtor's assets, included in which was in excess of one million dollars of unmortgaged cash.

On May 16, 1933, Debtor filed a petition for corporate reorganization in the District Court of the United States for the Eastern District of Missouri, Eastern Division, submitting therewith a Reorganization Plan bearing the date of May 10, 1933, and providing for a comprehensive readjustment of Debtor's obligations, including authorization to purchase and retire certain items of debt at substantially less than the face value thereof. (R. vol. 1, page 66)

This Reorganization Plan had been agreed to in writing by the Corporation and by the respective Bondholders' Committees representing the Kansas City, Fort Scott and Memphis Railroad Company bonds, the Prior Lien bonds, and the Consolidated bonds, who then held on deposit, with authority, more than 66% of each of said bond issues. By its terms the Debtor's stockholders were required to surrender only 26% of equity stock.

On the 17th day of March, 1937, the Commission re-

fused to certify the Plan so agreed to. (221 ICC Finance 199)

The Commission resumed hearings on further suggested Plans on the 8th day of February, A. D. 1939.

On the 6th day of July, A. D. 1940 (Supplemental Report Nov. 16, 1940) the Interstate Commerce Commission proposed its own Plan. (240 ICC 383; Submission Pamphlet, page 1, Exhibit 2, folio 65, page 36, Record in No. 638, October Term 1946)

This Plan was certified to the District Court.

Objections to the Plan were filed by the *mortgage creditors* to the treatment given to the Reconstruction Finance Corporation and the Railroad Credit Corporation, and separately by the Consolidated Bondholders' Committee to the treatment of their bonds as compared to other creditors, and by the Debtor objecting not only to the inequities covered by the objections of the creditors but to the failure to award securities to the *unsecured creditors* and to the *Debtor for distribution to its stockholders.*

The Plan was rejected by the District Court and ordered returned to the Commission. This order was dated the 25th day of July, 1942. The Reconstruction Finance Corporation and the Railroad Credit Corporation were both creditors and they appealed to the Circuit Court of Appeals of the Eighth Circuit from the Order of the District Court sending the Plan back to the Commission. This appeal was taken on or about February 4, 1943. Pending the appeal no progress was made in further hearings before the Interstate Commerce Commission.

On or about the 23rd day of November, 1943, the Reconstruction Finance Corporation and the Railroad Credit Corporation accepted the payment of $5,800,000 in compromise and their claims were released.

On the 16th day of February, A. D. 1944, hearings were resumed before the Interstate Commerce Commis-

sion. The three principal mortgage creditors proposed a new Plan.

On July 4, 1944, the Interstate Commerce Commission reported a new Plan which conformed substantially to the creditors' Plan.

Later, and on October 2, 1944, the Commission filed a Supplemental Report. (257 ICC 399 and 717, pages 73 and 93 respectively, of Submission Pamphlet; Exhibit No. 2, folio 65, page 63, Record in No. 638, October Term 1946, Supreme Court.)

The Debtor and Brooks, Admx, and Dikis, Admn, representing two unsecured creditors, objected to the approval of the Plan so submitted because of the exclusion of the unsecured creditors and the stockholders from participation in new securities.

On March 16, 1945, the District Court, having heard the objections, entered an order approving the Commission's Plan. (The Opinion is reported in 68 Fed. Sup. 921, and at page 97 of the Submission Pamphlet, Exhibit 2, folio 65, page 36 of the Record in No. 638, October Term 1946, Supreme Court).

The Debtor, and Brooks and Dikis, appealed from the Order of Approval to the Circuit Court of Appeals of the Eighth Circuit. These appeals were consolidated in the Circuit Court of Appeals for hearing and disposed of by the Order of the Circuit Court of Appeals dated the 8th day of February, 1946. (Reported 153 Fed. Rep. 2d, page 312). This Opinion is the only Opinion rendered in the Circuit Court of Appeals of the Eighth Circuit in which *reasons for sustaining the exclusion of unsecured creditors and the Debtor's equity are given.*

While the appeal from the Order of Approval was pending in the Circuit Court of Appeals, the Commission submitted the Plan to the holders of Fort Scotts, Prior Lien and Consolidated bonds for approval. (No other interests were entitled to vote under the Plan.) A large

majority of the holders of those securities who voted did so in favor of the Plan. Many did not vote and a small minority of those who voted declined to approve.

The unsecured creditors and the Debtor objected to the confirmation of the Plan by the court because of what they believed to be lack of fairness and equity, and failure to observe due process. On the 15th day of November, 1945, the district court entered a confirmation order.

The Debtor and Brooks and Dikis promptly appealed from the order of confirmation to the Circuit Court of Appeals of the Eighth Circuit. The interested mortgage creditors moved the Circuit Court of Appeals to dismiss the appeal from the order of confirmation on the ground that no new question was involved, and, on the 19th day of June, 1946, the appeal was dismissed without hearing on the merits.

Subsequent to the order of the Circuit Court of Appeals of the Eighth Circuit dated the 8th day of February, 1946, affirming the order approving the Plan, the Debtor and Brooks and Dikis applied to the Supreme Court for a writ of certiorari to review the action of the Circuit Court of Appeals, which proceeding was numbered 1108-9-10 in the October Term 1945, in the Supreme Court. The petition was filed on the 15th day of April, 1946, and denied on the 10th day of June, 1946.

A petition for rehearing was filed on the 12th day of June, 1946.

Pending the disposition of the petition for rehearing, and on the 14th day of September, 1946, the Debtor and Brooks and Dikis filed in this Court (October 23, 1946) their petition for certiorari asking a review of the action of the Circuit Court of Appeals of the Eighth Circuit evidenced by the order of June 19, 1946 dismissing the appeals from the order of the district court confirming the Plan.

On the 12th day of November, 1946, this Court denied that petition for certiorari.

On the 12th day of November, 1946, the Debtor filed

in the district court a petition asking that an accounting be had to make a definite determination of the cash which the court's trustees had realized from the operation of Debtor's property during the period of administration, and a determination of the extent to which such cash had been actually, and should be constructively, applied to the payment of the claims of the creditors, to the end that it should be judicially determined what the obligation of the Debtor's estate to its creditors, both in principal and interest, would be at the time of the allotment of securities.

Debtor asked the court to require the Trustee to purchase Debtor's bonds in the market at a discount.

Debtor further asked the court to consider the great changes that have taken place in respect of the Debtor's earning power since the Order of Confirmation, and that the Plan be remanded to the Commission for a consideration of those changes, a redetermination of prospective earning power and a comparison of the same with the amount found to be due the creditors after an accounting of earnings during administration in accordance with bankruptcy principles.

Meantime the court had appointed Reorganization Managers, and, on the 29th day of November, 1946, the Reorganization Managers and the mortgage creditors filed a petition asking for "an order of consummation and final decree".

Such petition incorporated provisions to seize the debtor corporation, and, as a preliminary to the hearing on the petition for consummation and final decree the Reorganization Managers and the mortgage creditors applied to the Interstate Commerce Commission for an order sanctioning such seizure. The Debtor filed an answer with the Interstate Commerce Commission asking to be heard on the issue, and, by order entered the 4th day of December, 1946, the Interstate Commerce Commission sanctioned such seizure and denied the Debtor the right to be heard.

Thereafter, and on the 10th day of December, 1946, a hearing was had on the petition for an Order of Consummation and Final Decree and on Debtor's petition for an accounting and for a remand of the Plan to the Commission, and on the 12th day of December, 1946, the court denied Debtor's petition *in toto,* expressed doubt as to the Debtor's right to be heard at all, and on the same day, over the objection of the Debtor, entered an order consummating the Plan and incorporated in such order provisions for the seizure of the Debtor corporation. (Order of Consummation and Final Decree, sections 1.04, 3.01 and 3.03.)

On the 14th day of December, 1946, Debtor filed notice of appeal from the order denying its motion to account the Trustee's cash and remand the Plan to the Commission, and immediately applied to the Circuit Court of Appeals on a short appeal for an order staying further proceedings. The application was denied.

This appeal was later, and on the 11th day of February, 1947, and upon the motion of the Reorganization Managers and mortgage creditors, *dismissed* but not *affirmed.*

Thereupon, and on the 20th day of December, 1946, the Debtor applied to this Court for an order staying further proceeding, which application was denied on the 23rd day of December, 1946.

Thereafter the Debtor appealed to the Circuit Court of Appeals of the Eighth Circuit in due and lawful manner from the Order of Consummation and Final Decree, and lodged the record in that court.

On the 31st day of January, 1947, the district court entered an order discharging the Trustee, and thereupon the Debtor filed notice of appeal to the Circuit Court of Appeals from that order.

On the 14th day of April, 1947, the Reorganization Managers filed in the Circuit Court of Appeals a motion

to docket and dismiss the appeal from the Order of Consummation and Final Decree and the appeal from the Order Discharging the Trustee.

On the 1[illegible]th day of April, 1947, the Circuit Court of Appeals of the Eighth Circuit entered orders dismissing both appeals.

Meantime, on the 20th day of December, 1946, the Debtor filed a motion in the district court asking for a rehearing from the Order of Consummation and Final Decree. The creditors and Reorganization Managers filed a motion to dismiss the motion for rehearing. On the 7th day of February, 1947, the district court denied the motion for rehearing and in his Order declared that the Debtor had no right to be heard.

On the appeal to the Circuit Court of Appeals of the Eighth Circuit from the order designated Order of Consummation and Final Decree and the order discharging the Trustee (which was appealed solely because the statute designates that order to be the *final decree)* the Debtor feels that it was entitled to raise questions not conceivably determinable by the Circuit Court of Appeals upon its consideration of the order approving the Plan, and it was denied the right to a hearing such as the laws and rules provide on the questions so presented by the record.